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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1281

EERIK HEINE, *Petitioner,*

v.

JURI RAUS, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The citations to the opinions below are presented in the Petition.

JURISDICTION

The Petition for a Writ of Certiorari was timely filed on January 28, 1971. By order of February 8, 1971, Mr. Chief Justice Warren E. Burger extended the time for filing this response to and including March 30, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the statutory proviso prohibiting the CIA from exercising "internal-security functions," 50 U.S.C. § 403(d)(3), bar the Agency from protecting its sources of foreign intelligence located in this country?

2. Does the governmental immunity from defamation liability recognized in *Barr* v. *Matteo,* 360 U.S. 564 (1959) and *Howard* v. *Lyons,* 360 U.S. 593 (1959) extend to a CIA agent carrying out orders of an authorized superior to warn sources of foreign intelligence of the presence of a Soviet agent?

3. Was petitioner denied a fair opportunity to test whether the agent issuing the warning was in fact a CIA employee acting under orders?

STATUTES AND RULES INVOLVED

The statutes and rules involved are reprinted in the Appendix to this Brief. They are:

United States Code

Title 50, §§ 403(d)(3), 403g 1a, 2a
Title 28, §§ 2674, 2680(h) 2a, 3a

Federal Rules of Civil Procedure

Rule 56(e), (f) (1963) 4a
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STATEMENT OF FACTS

Petitioner Eerik Heine, a Canadian citizen of Estonian background, brought a slander action against Juri Raus, a United States citizen, also of Estonian background (J.A. 19). Raus was the national com-

mander of an Estonian patriotic organization known as the "Legion of Estonian Liberation, Inc." (J.A. 181).

Heine portrayed himself as a vigorous anti-communist who had suffered much at the hands of the Russians for his guerrilla exploits in Soviet-occupied Estonia. He earned part of his livelihood by lecturing to Estonian emigre groups in the United States and Canada and exhibiting to them a motion picture allegedly based upon his exploits (J.A. 19-20).

Raus, by reason of his position in the Estonian liberation movement and his acquaintances among Estonian emigre groups, had from time to time been employed[1] by the Central Intelligence Agency (hereinafter "CIA") as a source of intelligence pertaining to Soviet Estonia and the activities of his compatriots in other countries (J.A. 181).

Counterintelligence officers of the CIA had received information through "confidential intelligence sources" from which they concluded that Heine was "a dispatched Soviet intelligence operative, a KGB agent." (R.J.A. 11).[2] In accord with his prescribed duties, one of these officers, in the course of a series of conferences, instructed Raus to warn certain members of the Estonian emigre community that Heine was a Soviet intelligence agent (J.A. 225; 285-6; R.J.A. 11, 23).

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[1] Raus' overt employment was as research engineer in the Bureau of Public Roads. For his Central Intelligence Agency employment, he was paid "directly or indirectly" by the Central Intelligence Agency (J.A. 264).

[2] R.J.A. refers to the Joint Appendix in the second appeal, following remand.

Thereafter, Raus, on November 9, 1963, at a meeting in New York of the Board of the Legion of Estonian Liberation, stated to the Board members that "Eerik Heine is a KGB agent" (J.A. 20, 24, 274-5). On two other occasions, he made substantially the same statement to August Kuklane, an officer of the Baltimore branch of the Legion (J.A. 24, 130).

When Raus was sued, he filed an answer in which he stated that when he spoke of Heine "he was in possession of responsible information received by him from an official agency of the United States Government to the effect that the plaintiff [Heine] was a Soviet agent or collaborator and on that account should not receive the cooperation of the Legion and its branches during the plaintiff's tours of the United States." (J.A. 24)

Subsequently, Raus filed an amended answer in which he stated:

> On those occasions specified in paragraphs 5, 6, and 7 of the complaint, the defendant was in possession of information furnished to him by the Central Intelligence Agency, and when he spoke concerning the plaintiff on such occasions he was acting within the scope and course of his employment by the Agency on behalf of the United States. Accordingly, the statements made by him on such occasions were absolutely privileged. [J.A. 169] [3]

Raus then sought to establish that when he acted on the occasions leading to the charge of slander, he

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[3] The record discloses that the CIA at first would not permit Raus to disclose his relationship to the Agency (J.A. 3). He could not do it unilaterally by reason of a Secrecy Agreement he had signed (J.A. 3). Subsequently, the CIA changed its position and permitted Raus to disclose his true role (J.A. 4-5; 165-69).

was an employee of the CIA discharging his duties. Relying upon the absolute privilege accorded federal employees under *Barr* v. *Matteo,* 360 U.S. 564 (1959), he filed a motion for summary judgment supported by an affidavit of Richard Helms, then Deputy Director of Central Intelligence. The affidavit affirmed that Raus, in speaking of Heine as charged, "was acting within the scope and course of his employment by the Agency on behalf of the United States" (J.A. 107-8).

That affidavit, at the behest of the Courts below,[4] was subsequently amplified in five other affidavits from Mr. Helms to provide additional detail (J.A. 107, 180, 225, 367; R.J.A. 11, 12). The most expansive of these stated that:

> 3. On those occasions specified in paragraphs 5, 6 and 7 of the complaint filed in this action, as a Deputy Director of the Agency, I was charged by the Director of Central Intelligence, with the specific responsibility, among others, for the conduct of the Agency's counterintelligence operations, the purpose of which is to protect intelligence activities, sources and methods against the operations of foreign intelligence services.
>
> 4. Prior to November 9, 1963, this Agency through confidential intelligence sources available to it received certain information concern-

[4] The District Court requested greater detail than that contained in the first affidavit (J.A. 212-3; 224-5; 306-7). The Fourth Circuit, while affirming in general the District Court's disposition, 399 F.2d at 788, found a question of whether Raus' instructions had emanated from an officer of the Agency having the requisite authority, 399 F.2d at 791. This resulted in a remand on very narrow grounds—for a finding either of proper prior authority or ratification by a proper official. Two further affidavits were filed in the course of proceedings in the District Court. These established both prior authority and subsequent ratification. (R.J.A. 11, 23)

ing Eerik Heine which was analyzed and evaluated by counterintelligence officers responsible to me, who reached the conclusion that Eerik Heine was a dispatched Soviet intelligence operative, a KGB agent. In the performance of his assigned counterintelligence function, the counterintelligence officer responsible for safeguarding sources of intelligence developed within Estonian emigre groups, acting in accordance with his prescribed duties, instructed Juri Raus to warn members of the Estonian emigre groups that Eerik Heine was a Soviet intelligence operative, a KGB agent.

5. After initiation of the present suit, the entire matter was reviewed by me personally as a Deputy Director of the Agency. In December 1964, acting in my capacity as the said Deputy Director with responsibility for all Agency counterintelligence operations, I ratified and approved the action taken by the counterintelligence officer who instructed Juri Raus to warn members of the Estonian emigre groups that Eerik Heine was a Soviet intelligence operative, a KGB agent. In so ratifying and approving, I acted pursuant to the authority vested in me by the then Director of Central Intelligence. In my present capacity as Director of Central Intelligence, I now affirm that appropriate authority was vested in the said Deputy Director by the then Director of Central Intelligence to authorize, approve, or ratify the instructions given to Juri Raus. The several affidavits which I have provided the Court in this matter, in my capacity as the Deputy Director of Central Intelligence, were intended as ratification and approval of said instructions. [R.J.A. 11-12]

During the pendency of the motion for summary judgment, the deposition of Juri Raus was taken (J.A. 248-91) and numerous written interrogatories were submitted for answers by the Director of Central

Intelligence[5] (R.J.A. 13-22; 121-27). In respect of each inquiry, there inhered the possibility that questioning would expose the identity of the counterintelligence officers involved, the chain of intelligence transmitted, and the methodology employed by the CIA in the discharge of its national security function. Consequently, acting under the practice approved in *United States* v. *Reynolds,* 345 U.S. 1 (1953) and under pertinent statutory authority, 50 U.S.C. § 403g, a formal claim of testimonial privilege against the disclosure of information relating to intelligence sources and methods was filed by the Director of Central Intelligence (J.A. 234-35). The District Court carefully considered each inquiry in respect of any privilege claimed, a method which the Circuit Court approved, 399 F.2d at 788, 791. On remand, the District Court adhered to the same procedure in considering and sustaining a partial claim of privilege to three questions, 305 F.Supp. at 818-19.

The method of discovery employed, restricted by the CIA claim of testimonial privilege, admittedly prevented the plaintiff from engaging in uninhibited inquiry into all details of Raus' employment with the Agency. However, no critical question was foreclosed, and no promising avenue of inquiry was blocked.[6] The

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[5] Petitioner did not file any affidavits which contradicted the fact of employment, but the District Court did permit discovery regarding matters "not privileged," Rule 26(b) (1948), in accord with Rule 56 (e)(f), Fed. R. Civ. P. (1963).

[6] The claim by petitioner that he was effectively denied his right of cross examination (Pet. 15) is more hyperbole than fact. An examination of the record will disclose that the questions to which the claim of privilege was sanctioned would not have undone the evidence of employment. They rather sought to expose a

evidence at hand disclosed unquestionably that Raus was pursuing the business of the CIA in speaking as he did on the occasions for which he was sued for defamation. If so, he as well as his employer were immune from suit. The Federal Tort Claims Act, 28 U.S.C. §§ 2674, 2680, excepts defamation from the ambit of the liability fixed upon the United States, 28 U.S.C. § 2680(h).

REASONS TO DENY THE WRIT

We respectfully submit that certiorari should be denied because the law upon which the case was decided below is already well established by decisions of this Court and those of other federal courts.

1. At the threshold of this case is Question # 2 of the Petition challenging the CIA's involvement as unlawful. Petitioner urges that, within the boundaries of this country, the discrediting of a foreign intelligence agent is beyond the statutory perimeter of CIA functions. He relies for that view upon a proviso to the CIA's statutory powers that denies to the Agency any "internal security functions," 50 U.S.C. § 403 (d)(3). Petitioner's theory of the proviso appears to be that any discrediting action taken by the CIA in the United States is an "internal-security" function whether or not the intelligence gathering protected by that action is foreign, rather than domestic, in character.

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counterintelligence operation of the CIA, *e.g.*, R.J.A. 121, 123, 124,; J.A. 253, 256-64, 268-70, 281, 287. After much consideration, plaintiff's counsel, following remand, was unable to conceive of a question with respect to the employment of Raus by the CIA which had not been answered (R.J.A. 166), and none was suggested when the matter was rebriefed for the Circuit Court.

The complete answer to that contention is found in a second statutory proviso that cannot properly be ignored in interpreting the first one:

> *And Provided further,* That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure. [50 U.S.C. § 403(d)(3).] [*See also,* 50 U.S.C. § 403g.]

The "unauthorized disclosure" threatened in this case is not speculative. If a secret Soviet agent succeeds in infiltrating domestically-based emigre groups that are conduits of foreign intelligence, the agent is well on the way toward one of his principal goals—the disclosure and extermination of those sources abroad that furnish foreign intelligence to groups located here.[7] Indeed, even if just to protect the "methods," 50 U.S.C. § 403(d)(3), used by the Agency in the gathering of foreign intelligence from a domestic emigre group, the exposure of an infiltrating agent is at the hard-core of the statutory responsibility of the Director of Central Intelligence.[8]

2. The unambiguous statutory directive to protect intelligence sources bears directly as well upon another

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[7] Accordingly, petioner's argument is baseless that the legitimacy of the CIA's action here depends upon "cropping" the words "from unauthorized disclosure" from the statutory description of its protective function.

[8] Petitioner adds only confusion to its presentation on this issue by suggesting that the CIA relies upon Regulation H.R. 10-20 to elaborate the scope of its statutory function. That regulation (See Pet. 48a-49a) is irrelevant to the question presented and was cited by the Agency only in support of its power to resist discovery of state secrets—a wholly separate issue. See point 3, *infra.*

question presented for review. Petitioner contends that this case unduly extends the doctrine of *Barr* v. *Matteo,* 360 U.S. 564 (1959). That case and its companion, *Howard* v. *Lyons,* 360 U.S. 593 (1959), did no more than reaffirm the well-established immunity of governmental agents in suits for defamation arising from statements made in the "line of duty."[9] *Barr* restated the sound policy underlying the immunity by recognizing that malevolent public officials will benefit, but that "in the end [it is] better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation . . . ." *Gregoire* v. *Biddle,* 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.) (quoted at length in *Barr,* at 571-72). The facts of this case, including the Congressional directive, show that it entails no extension of the immunity doctrine at all. Indeed, this case presents an instance even closer than *Barr* to the heart of the purposes that justify the protection the doctrine affords.

The *Barr* defamation suit arose from a press release Barr had issued as Acting Director of the Office of Rent Stabilization. The release was designed to answer Congressional criticism of an ORS practice by identifying the officers responsible for it. Although the issuance of press releases was a "standard agency practice," 360 U.S. at 574, Barr lacked statutory authorization for the practice, much less any articulated Congressional purpose justifying its use to discredit

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[9] Although the roots of our immunity doctrine are embedded in English jurisprudence, *see e.g., Sutton* v. *Johnstone,* 1 T.R. 493 (1786), the landmark American precedents are *Spalding* v. *Vilas,* 161 U.S. 483 (1896) and *Gregoire* v. *Biddle,* 177 F.2d 579 (2d Cir. 1949) (L. Hand, C.J.).

other agency officials.[10] This Court nonetheless properly afforded immunity since the criticism calling for an answer pertained to official business subject to Barr's control, 360 U.S. at 573-75.

It is fair to observe, however, that *Barr* afforded immunity in a setting in which it was at least arguable that the defamation was "a personally motivated effort on the petitioner's part to disassociate himself from the alleged chicanery with which the agency had been charged," 360 U.S. at 592 (Stewart, J., dissenting).[11] No such suspicion of personal motivation hovers over this case. In view of the clear Congressional directive to protect intelligence sources, the CIA's technique of discrediting an infiltrating agent is plainly adapted to achieve the legislative purpose. As the Circuit Court noted:

> In such circumstances, is the CIA to seek an indictment on charges it cannot prove if the sources of its information [as to petitioner's disguise] are its own secret agents in the Soviet Republic? Is it to sit idly by, suffering a pollution of its sources of foreign intelligence and the intimidation, arrest and persecution of its foreign agents? Or can it protect its sources of information, as required by the statute, by 'warning' its own sources that the infiltrator is, or may be, a Soviet agent? [399 F.2d at 790]

This case is not different from *Barr* because injury to reputation was the intended result. Nor need *Barr*

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[10] At best, "the press release was neither unauthorized nor plainly beyond the scope of Mr. Barr's official business. . . ." 360 U.S. at 577-78 (Black, J., concurring).

[11] Mr. Justice Stewart fully agreed with the principles of *Barr* and thus joined in applying them to the companion case of *Howard* v. *Lyons*, *supra*.

be reexamined in the context of this case, as urged (Pet. 18), by reason of differences in the degree of intentionality. The question is not the degree of intent to defame but the governmental purpose to be served. There was as much intent to discredit in *Barr* as here. The cases arguably differ, however, in the speaker's fidelity to the governmental purpose to be served. In this case, a discrediting warning was chosen to implement, directly and efficiently, an identifiable national security policy. In *Barr,* by contrast, the purpose to relocate blame lies more nearly in the shadowland of the "public interest." Notably as well, consistent with the specificity of its purpose, the effort to discredit here was limited in publication to the target emigre community, whereas Barr's defamation was announced less discriminately to the public at large.

It thus misconceives the purpose of *Barr* immunity to suggest that it "envision[s] defamation and possible slander as the occasional failures of fallible human beings acting as government officers and not as instruments of government policy." 399 F.2d at 794 (dissenting opinion). It is vital to differentiate in this regard purposeful *defamation* from purposeful *falsehood.* Neither *Barr* nor this case enshrines *falsehood* as an instrument of government policy. Both cases do no more than recognize that, in the course of effectuating governmental policy, agents of the government will make statements that discredit individuals. The statements are made intentionally and with awareness that damage to reputation will be done. When a claim is filed alleging malicious falsehood, however, the

> justification [for affording immunity] is that it is impossible to know whether the claim is well

> founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. [*Gregoire* v. *Biddle, supra,* at 581.]

Accordingly, quite to the contrary of petitioner's contention, in both *Barr* and this case, judicial inquiry into the truth content of the statement and the state of mind of its maker is foreclosed precisely because in both cases the deliberate making of the statement is a justifiable "instrument of government policy." And it would be most ironic indeed if immunity were held applicable, as in *Barr,* where the statement ambiguously serves a governmental interest, and inapplicable where, as here, it is preeminently and narrowly designed to fulfill a statutory mandate.

Finally, it is no ground of distinction that the discrediting comments were uttered, not by the Director of the CIA, but respondent Raus, a subordinate acting pursuant to orders. *Barr* recognized that the "complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and a redelegation of authority as to many functions. . . ." 360 U.S. at 573. We do not suggest here that every government employee at every level is thus clothed with *Barr* immunity. But it would undermine the function of the doctrine itself to withhold its mantle from an employee acting upon orders from a protected official. In a suit such as this, aimed at the subordinate, the superior would be compelled to defend his agent at the cost of the same harassment the doctrine is designed to obviate.

Indeed, when the duty to speak is mandatory, the immunity has consistently been regarded as warranted.[12] *8 Wigmore on Evidence,* § 2368. Common sense alone teaches that if immunity attaches to the superior with discretion to speak, the argument is even more compelling on behalf of the employee who is given no such choice. Even more importantly, however, that conclusion is required by the central purposes of the doctrine. Immunity is "not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." 360 U.S. at 572-3. It hardly serves the effective functioning of government to require, as a condition of litigational immunity, that the Director utter the discrediting statements himself, instead of selecting a delegate whose established reputation in the relevant community makes it even more likely that the message of warning will be accepted.

3. The *Barr* immunity thus properly attached to respondent Raus, but only if he was acting in the "line of duty." 360 U.S. at 575. A procedural issue pertaining to the manner of proving that allegation is the remaining question presented for review. On that question, petitioner complains of curtailed "cross examination" and of respondent's use of "conclusory affidavits" to support summary judgment. (Pet. 12-15) In essence, petitioner contends that he was denied an effective opportunity to ascertain whether Raus was in fact acting as a CIA employee under orders.

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[12] The application of immunity in *Barr* to the discretionary acts of higher officials presumed its applicability in the mandatory context: "That petitioner was not *required* by law *or by direction of his superiors* to speak out cannot be controlling. . . ." 360 U.S. at 575 (Emphasis added)

To this day, however, despite repeated opportunities, he has not pointed to a single line of inquiry which was foreclosed to him that would suggest the possibility of a successful attack upon the statements of the Director of Central Intelligence affirming and ratifying Raus' employment for the task he performed.

The procedures adopted in the District Court for testing Raus' "line of duty" defense were complicated by the decision of the Director of Central Intelligence to invoke his statutory privilege against the disclosure of information pertaining to the national intelligence establishment. That factor gives an appearance of severity to the result reached below. The procedures adopted by the District Court, however, reflect a careful balancing of competing interests and were conducted with scrupulous attention to the precepts announced by this Court in *United States* v. *Reynolds,* 345 U.S. 1 (1953), and to the particularities of the Federal Rules of Procedure.

The affidavits submitted by the Director of Central Intelligence and his responses to petitioner's written interrogatories clearly establish from a government source of the first rank that Raus acted as a government employee on official business in pursuit of a purpose ordained by Congress (J.A. 107, 180, 225, 367; R.J.A. 11, 23; 121-27). At the commencement of petitioner's discovery, 424 interrogatories were directed to Raus, but only 13 were relevant to the issue of employment. Upon Raus' motion to strike, the District Court suggested that petitioner either submit a limited list of interrogatories confined to the employment issue or take Raus' deposition (J.A. 150-51; 161-62). Petitioner's counsel never attempted to refine the inter-

rogatories (*see, e.g.,* J.A. 336), but Raus' oral deposition was taken in open court (J.A. 246-91).

Under a secrecy agreement he had signed with the Agency (J.A. 189), itself some evidence of Agency employment, Raus was precluded from answering questions about his CIA employment without the consent of the Agency (J.A. 3-4). At the commencement of his oral deposition, a formal "Claim of Privilege" was filed over the signature of the Director of Central Intelligence. Interrogation proceeded under judicial scrutiny and Raus' testimony confirmed the statements of the Director's affidavits. Claims of privilege were raised at inquiries for other details. The District Court, following the precepts of *United States* v. *Reynolds,* 345 U.S. 1 (1953), considered each claim with respect to the particular question put to Raus. Those questions to which a claim of privilege was sustained were wide of the mark on the issue of Raus' CIA employment (J.A. 253, 255, 256, 268, 273-74, 281, 286-87).

In typically summary fashion, petitioner's counsel stated:

> . . . we would ask then when was the first conference held, how many participants were there, who initiated the conferences, did they come to him, did he go to them, what was discussed, what facts were stated about Eerik Heine, what the discussion was, was he then given an opportunity to become an informer for the CIA or a casual contact or what his relationship was. [J.A. 286-87]

Since these questions went well beyond the basic fact of employment, the wide-ranging inquiry they portended properly called for the invocation of privilege

to abort disclosure of the details of intelligence sources as well as the organization, functions and personnel of the Agency, 50 U.S.C. § 403(d)(3) and 403g.

Petitioner did not file any affidavits which contradicted the fact of CIA employment. See Rule 56(e), Fed. R. Civ. P. The Court afforded him opportunity for discovery, Rule 56(f), limited inherently to matter "not privileged," Rule 26(b). Since there was no genuine dispute concerning Raus' employment by the CIA, the Court of Appeals agreed that *Barr* immunity was available to Raus and unanimously affirmed that the District Court had fully complied with the procedures prescribed by *Reynolds* in sustaining the limited invocation of privilege (Pet. 15a-16a). The Court vacated summary judgment only to permit a limited additional inquiry into whether Raus' instructions were issued by an authorized official or ratified by an official with authority to approve them (Pet. 22a).

Following remand, in support of a renewed motion for summary judgment, the Director filed an affidavit showing that: (1) Raus had received his instructions from a counterintelligence officer authorized to instruct him as he did, and (2) that these instructions were subsequently ratified by him, first as Deputy and then as Director (R.J.A. 10-12).

The District Court held a conference at which petitioner sought leave to take the Director's deposition. Finding that petitioner's proposed inquiry ranged beyond the bounds of the remand, the Court ordered that written questions be submitted to the Director before it would authorize an oral deposition.[13] (R.J.A.

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[13] This was clearly within the District Court's discretion. Rule 30(b), Fed. R. Civ. P. (1938).

162) When the questions were submitted, many were still beyond the scope of remand and the Court sustained objections to them (R.J.A. 163). The Court found other questions permissible, however, and ordered a response from the Director, subject to specific claims of testimonial privilege. The Director answered all questions, save for parts of three to which claims of privilege were made and sustained (R.J.A. 121, 123, 124, 168). The Court described the Director's answers as "very full" (R.J.A. 132) but nonetheless reflected a willingness to allow the Director's deposition if petitioner could make some showing that additional relevant information would be developed. Petitioner's counsel, however, were unable to suggest even one proper factual question (R.J.A. 139, 146-47, 150, 158). Accordingly, finding that no line of suggested inquiry warranted an oral deposition of the Director, the District Court reentered summary judgment (See Pet. 11a).

This time, the Court of Appeals unanimously affirmed the summary judgment after an oral argument during which petitioner was still unable to suggest even one proper factual question remaining to be explored.

This Court has already approved proof of governmental employment upon "uncontradicted affidavits" such as those submitted in the present case. *Howard* v. *Lyons,* 360 U.S. 593 (1959). Seeking both to distinguish *Howard* and to show that summary judgment under Rule 56 was inappropriate, petitioner suggests that there were conflicts within the affidavits. Petitioner points to two claims of inconsistency (Pet. 13-

14), neither of which, however, will withstand analysis.[14]

Simply put, there was no genuine issue for trial on the only question material to the motion for summary judgment. Petitioner has not been able to articulate one additional avenue of inquiry which would cast doubt upon the existence of the governmental service performed by Raus at the behest of the responsible officer of the CIA. With due regard to the confidential nature of the matters under scrutiny, the District Court's procedures, adopted to accommodate conflicting interests, were eminently suited to the task at hand.

Petitioner has never been able to suggest an alternative procedure that would likewise accommodate those conflicting interests. The procedures used did not deprive him of a fair opportunity to test respondent's

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[14] The first pertains, not to a conflict between "opposing affidavits," Rule 56(e), but to an apparent inconsistency between the affidavits of Raus and the Director (Pet. 13-14). Raus stated that as of January 15, 1965, he was employed by the Bureau of Public Roads. Contrary to petitioner's suggestion, that averment is fully consistent with the Director's recital that Raus was a CIA employee *at times earlier* than January 15, 1965—the times when he spoke of petitioner as a Soviet agent.

The second alleged conflict is spurious also. Petitioner contends that Raus denied "the allegations" of the complaint that he had spoken of petitioner in a defamatory manner to one Kuklane (Pet. 14.) This is inaccurate. Raus' answer admitted that he spoke to Kuklane substantially as set forth in the complaint. He denied the precise times of speaking and the innuendos attributed to him (J.A. 24). Neither issue is material to the question of Raus' CIA employment. Moreover, petitioner, in the face of a motion for summary judgment, "may not rest upon the mere allegations of his pleading." Rule 56(e), Fed. R. Civ. P.

claims. But they did properly bar him from exploiting the Rules of Civil Procedure to probe, without manifest justification, into the organization and functions of an important agency of national security.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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